

CANADA / JUDGMENT

McKenzie v. Kelly

2025 BCSC 1857

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2025 BCSC 1857 McKenzie v. Kelly

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McKenzie v. Kelly,

2025 BCSC 1857

Date: 20250925

Docket: S220454

Registry: Vancouver

Between:

Kenneth James Douglas Alexander McKenzie,

and Jacqueline Lucille Falk

Plaintiffs

And

Delphine Elna McKenzie Kelly, Andrea Susan Kelly Cotman,

and Stephen Andrew Kelly

Defendants

Before: The Honourable Justice Kirchner

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

September 8-12, 2025

Place and Date of Judgment:

Vancouver, B.C.

September 25, 2025

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I. Introduction

- [1] In 1939, James McKenzie acquired a 20.2-acre property about 15 km southwest of Whistler, B.C. near McGuire Road which now runs off the Sea-to-Sky Highway. At the time, the property was only accessible by rail from Squamish. The parties to this case are James' descendants and their dispute is over the plaintiffs' entitlement to a share of the property. James died in 1964. In his will, made the previous year, he left the property to the principal defendant and her mother (James' second wife). The plaintiffs, who are the descendants of James' first marriage, claim a 25% interest in the property based on an agreement they allege their father made with the principal defendant's mother in 1985. Alternatively, they claim an interest on grounds of proprietary estoppel and unjust enrichment.
- [2] The defendants acknowledge there was a promise to gift a portion of the property to the plaintiffs' father in the 1980s but state the promise was conditional upon the property being subdivided, which ultimately could not happen. They deny there was ever a representation made that they would unconditionally confer an interest in the property to the plaintiffs or

their father and deny the plaintiffs or their father ever acted in reliance on such a representation. The defendants argue the relatively small amounts of money the plaintiffs spent on the property was to enhance their own enjoyment of it and are miniscule compared to the lifetime of free and unrestricted use and enjoyment they have had of the property.

- [3] For the reasons that follow, I agree with the defendants and I would dismiss the plaintiffs' claim with costs. I will refer to all persons involved in this matter by their first names because several of them share the same last name. I do so to avoid confusion and intend no disrespect.

II. Background

- [4] The plaintiffs, Kenneth (Ken) McKenzie and Jacqueline Falk, are two of James McKenzie's grandchildren. Ken was born in 1942 and Jacqueline in 1951. They have two other siblings: Marlene Duncan (nee McKenzie) who was born in 1947 and Michelle McDonald (nee McKenzie) who was born in 1953. I will refer to these four as the "McKenzie Siblings". There is a marked rift between Ken and Jacqueline on the one hand and Marlene and Michelle on the other. Neither Marlene nor Michelle are plaintiffs and both they gave evidence for the defendants. They make no claim at all to the property.
- [5] The McKenzie Siblings' father was Douglas McKenzie who, along with his twin brother, Bruce McKenzie, was born to James and his first wife, Anne, sometime, it seems, in the 1910s. James and Ann were divorced in 1921 and in 1938 James married Mildred McKenzie. James and Mildred had one child together, the principal defendant, Delphine Kelly (nee McKenzie), who was born in 1939, around the time James acquired the property.
- [6] James, Mildred, and Delphine lived together in a house on the property. At some point, Douglas built a small cabin on the property which he used in the summers with his family. Douglas and his wife, along with their children (the McKenzie Siblings) otherwise lived in the Lower Mainland. Thus, the McKenzie Siblings grew up spending time in the summer at the property with their parents, staying in the cabin. Everyone, including James, Mildred and Delphine, informally recognized the cabin as belonging to Douglas and his family, at least in the sense that they had unrestricted use of it. There is no evidence that James, Mildred, or Delphine ever used the cabin and apparently never had a key for it.
- [7] Over the years, Douglas did considerable work on the property. In addition to building the cabin, he dug a well on the property for the benefit of both the house and the cabin, he installed a buried septic tank next to cabin, and he kept up the grounds by clearing trees and cutting the grass. As the McKenzie siblings grew up, they too helped with maintaining the property.
- [8] In 1963, James made a will in which he left the property to Mildred and Delphine. He discussed this with Douglas and, it would seem, Bruce, both of whom were content with Mildred and Delphine receiving the property. As Ken testified, the property had little

monetary value at the time as it was still accessible only by rail. Douglas and Bruce had jobs in Vancouver and neither felt they needed to inherit the property. Thus, when James died the following year, each received an undivided one-half interest as tenants in common with no objection from Douglas. However, Douglas and his family continued using the cabin, just as they had before James died. Neither Mildred nor Delphine objected to this and, in fact, welcomed their continued use.

- [9] In the 1980s, Douglas evidently told Mildred that he would like to have a portion of the property where the cabin was located put into his name. He and Mildred discussed the idea and attempted to have the property subdivided so the southern portion containing the cabin could be transferred to Douglas. (For convenience, I will refer to this as the "Cabin Section".) The house sat on the northern 75% of the property that would remain with Mildred and Delphine.
- [10] In 1984, Mildred and Douglas each retained lawyers to pursue the subdivision idea. Mildred's lawyer, David Bilinsky, wrote to the Municipality of Whistler on September 27, 1984 enclosing a sketch plan of the proposed new Cabin Section and asking if the property could be subdivided as shown on the sketch. Whistler responded on October 4, 1984, advising that the subdivision would not be permitted because the proposed new lots did not meet the bylaw's minimum parcel size and did not have the required frontage on a highway. In fact, there was no road access at all to the property from the highway because it was bound by the railway over which there was no lawful road crossing.
- [11] With the failure of the subdivision proposal, Mr. Bilinsky wrote to Douglas' lawyer on December 4, 1984 with an alternative proposal which included:
- a) granting to Douglas a right of first refusal to buy the property if Mildred and Delphine chose to sell it;
 - b) entering into an agreement for the ongoing shared use and maintenance of the property; and
 - c) entering into a further agreement that if the property was sold, Douglas would receive a fixed portion of the proceeds of sale, "as reimbursement for the improvements placed on the lands." The fixed portion was "to be decided on shortly".
- [12] Douglas refused this offer. As his lawyer confirmed in a letter dated December 10, 1984, Douglas was "not at all interested in the proposal" and in a letter to Mr. Bilinsky dated December 10, 1984, he confirmed Douglas' refusal. Mr. Bilinsky then closed his file. In a reporting letter to Mildred and Delphine dated February 26, 1985, Mr. Bilinsky wrote, "the suggestion that [Douglas] be given a percentage interest in the lands would be unworkable, in my opinion."
- [13] At this point in the story, the parties' evidence diverges. Ken testified that Douglas was initially angry about the December 4, 1984 proposal but, after he had refused it, he eventually cooled down and came to an agreement with Mildred to recognize his ownership

in the Cabin Section. Ken said in reliance on that agreement, Douglas spent some \$20,000 to bring power to the property for both the house and the cabin and he and the McKenzie Siblings put time and money into the cabin and the larger property over the years to improve and maintain it. He testified that after Douglas died in 1997, and shortly before Mildred's death a year later, Delphine confirmed the agreement and assured Ken that they would take steps to address the formal legal recognition the McKenzie Siblings' ownership of the Cabin Parcel. He said Delphine called him in 2002 to say she planned to sell the property and invited Ken, as a representative of the McKenzie Siblings, to buy it for 75% of its assessed value. The 25% discount was in recognition of their ownership of the Cabin Section. For reasons I will address later, that sale never happened.

- [14] Delphine denies that Douglas and Mildred reached the agreement in 1985 as described by Ken. She acknowledges that Mildred proposed that the Cabin Section would be given to Douglas if it could be subdivided, and that she was agreeable to that. However, the condition of the subdivision was critical to this proposal and, when that proved impossible, the proposed gift failed. She had always been willing to honour the intention of that proposal, either by allowing the McKenzie Siblings to buy the property at a discounted rate when she was ready to sell it or by giving them a portion of its sale proceeds, but she says this does not amount to a legal obligation. As recently as 2023, when she and her children eventually sold the property, she would still have been prepared to give the McKenzie Siblings some money from the sale but, as she said in her evidence, she was "not happy with being sued."
- [15] After Mildred died in 1998, her one-half interest in the property went to Delphine and Delphine's two children such that Delphine came to hold a 75% interest in the property and her children, the defendants Andrea Cotman and Stephen Kelly, each held a 12.5% interest.
- [16] In January 2022, Ken and Jacqueline started this action seeking a declaration that the defendants hold a one-quarter interest in the property as bare trustees for the plaintiffs (and perhaps their siblings). They also filed a certificate of pending litigation against property. The defendants sold the property in 2023 for \$4.2 million. One quarter of that amount, being \$1,042,844 after sale expenses, is being held in trust by the defendants' lawyers. I assume this was done pursuant to an agreement with the plaintiffs to cancel the certificate of pending litigation.
- [17] The plaintiffs argue they are entitled to a judgment that recognizes the McKenzie Siblings as beneficial owners of a one-quarter interest in the property. Since the property has now been sold, they seek an order that the money held in trust be paid out to them. Their claim is founded in contract and, alternatively, proprietary estoppel and unjust enrichment.

III. Analysis

A. The Claim in Contract

- [18] The plaintiffs claim that in 1985, Mildred and Douglas reached a binding verbal agreement by which Mildred (presumably for herself and on behalf of Delphine) recognized that Douglas and his heirs are the owners of the Cabin Section of the property. They argue that as Douglas' heirs, they have a right to enforce that agreement and claim an interest in the property proportionate to the Cabin Section.
- [19] Ken testified the agreement was reached in a meeting between Mildred and Douglas that he attended as a witness. His evidence of the agreement is therefore hearsay, but the defendants took issue only with the weight to be given to that evidence and not its admissibility. In fact, there was a great deal of hearsay evidence given by all four McKenzie Siblings, mostly relaying things they purportedly heard Douglas say. No objections were taken to any of this evidence and all parties were content to leave it to weight.
- [20] In closing submissions, the plaintiffs claimed the terms of the agreement are essentially those set out in Mr. Bilinsky's December 4, 1984 letter, but that does not accord with Ken's evidence of what was discussed at the meeting he witnessed.
- [21] Ken testified that the meeting took place at the property in the summer of 1985, several months after Douglas had rejected the alternative proposal in Mr. Bilinsky's December 4, 1984 letter. Ken testified that, while Douglas was initially angry about the offer, he later cooled down and realized that since Whistler had rejected the subdivision, some other arrangement would be necessary to confirm his family's interest in the Cabin Section. He therefore arranged to meet with Mildred to discuss the issue and asked Ken to attend the meeting as a witness.
- [22] Ken testified that they met Mildred at the well located between the house and cabin. The well was crucial to the discussions because it serviced both the house and the cabin and was the only well on the property. If Douglas was to be recognized as the owner of the Cabin Section, it had to include access to the well. Ken said that Douglas and Mildred discussed drawing a line perpendicular to the railway at the western boundary of the property, through the middle of the well and to the eastern boundary of the property at the Cheakamus River. The land to the south of that line - the Cabin Section - would be Douglas' and the land to the north would remain Mildred's and Delphine's. The well was to be shared equally by the two properties. Ken testified that the meeting concluded with Mildred agreeing that the Cabin Section "was going to be ours" and Douglas was happy with that. Ken suggested the meeting was conclusive as to Mildred's recognition of Douglas' ownership of the Cabin Section. He said the issue of how this recognition would be given legal effect as against others remained to be sorted out, given the rejection of the subdivision, but as far as the family was concerned, the issue of Douglas' ownership was conclusively settled.

- [23] Ken testified that after this meeting, his brother-in-law, Craig Duncan (Marlene's husband), who was an engineer, prepared an informal survey of the proposed subdivided property and calculated the Cabin Section as being 6.24 acres, which is about 25% of the overall property. This survey was not in evidence but Ken claims to have seen and read it. Craig Duncan has since passed away.
- [24] Delphine testified that she knew nothing about the meeting at the well. She acknowledged she and Mildred were both willing to transfer ownership of the Cabin Section to Douglas, but only if it could be subdivided from the rest of the property. It was important to Mildred and Delphine to retain the unrestricted ability to sell the property, or their portion of it if it was subdivided, and so they were only prepared to see Douglas receive title to a portion of the property if that portion could be subdivided from the rest. As stated in Mr. Bilinsky's February 26, 1985 reporting letter, giving Douglas a percentage interest in the whole property would be "unworkable".
- [25] I find the events at the well as described by Ken fall well short of establishing a binding agreement to recognize or gift an ownership interest in the Cabin Section to Douglas. As a matter of law, key elements of a binding and enforceable contract are simply not present in the evidence. Nor does the evidence support a manifest intention on Mildred's part to be bound by mutually-understood terms that would recognize Douglas' ownership. Factually, I find the events relating to the meeting at the well took place in 1984, before Mr. Bilinsky's efforts to subdivide the property, and not in 1985 as Ken suggests. The purpose of the discussions at the well was to initiate the subdivision proposal and not to negotiate a binding agreement to recognize the Cabin Section as belonging to Douglas or to confer on him an ownership interest in it.
- [26] A contract is an undertaking by one party who makes a promise to do something for the other party in exchange for something else. That exchange of promises is only enforceable if there is an agreement or consensus on the existence, nature and scope of the parties' respective rights and duties: *Suen v. Suen*, 2013 BCCA 313 para. 40. In this case, several key elements needed for a binding contract are absent.
- [27] First, the fact that Delphine was not a party to the alleged agreement is fatal. As the holder of an undivided one-half interest in the property, Delphine's participation in an agreement to confer or recognize Douglas' ownership of the Cabin Section was essential. However, she did not attend the meeting and there is no evidence she knew of it or endorsed the purported agreement.
- [28] The plaintiffs argue there is evidence Delphine had previously agreed to transfer the Cabin Section to Douglas such that it was not necessary for her to be present at the meeting. They point to Mr. Bilinsky's September 27, 1984 letter to Whistler requesting the subdivision. That letter states that both Mildred and Delphine "wish to give a portion" of the property to Douglas. However, Ken's evidence was the agreement was reached the following summer after the subdivision request had failed. Thus, Mr. Bilinsky's September 27, 1984 letter is

evidence only of Delphine's intention give Douglas a subdivided portion of the property and nothing else. It is not evidence that Mildred had authority to bind Delphine in 1985, after the subdivision failed, to some other arrangement. Conceivably, Mildred could have agreed to give Douglas a portion of her own undivided one-half interest during the meeting but that is not the agreement Ken described in his evidence.

- [29] Second, even if Mildred could recognize or convey an interest in the property to Douglas without Delphine's involvement, it is questionable whether any consideration given or agreed to for this promise. Consideration is an essential ingredient for a valid, enforceable, and legally acceptable contract: *Suen*, para. 41. Arguably, the consideration might have been to compensate Douglas for work he had put into the property in the past and might contribute in the future, but even if that could constitute consideration, Ken gave no evidence of any discussion of that at the meeting. The absence of any discussion about an essential element of a contract undermines the legal foundation for the contract. It also sheds light on the nature of the discussion, indicating that it was more likely about a gift or a potential gift of the Cabin Section to Douglas rather than a binding agreement to immediately recognize Douglas as its lawful owner.
- [30] Third, and more generally, the evidence of specific terms by which the parties agreed to be bound is lacking, as is the evidence of a manifest intention on Mildred's part to be bound by mutually-agreed terms: *0827857 B.C. Ltd. v. DNR Towing Inc.*, 2020 BCSC 717 at para. 53. Ken's account of the meeting evinces a clear mutual intention on Mildred and Douglas' part to identify a property boundary for the purposes of creating a potential new lot. There was clear agreement that the line should bifurcate the property at the well such that the Cabin Section would represent about one quarter of the overall property size. However, agreement on where the boundary should be located is not an agreement to recognize or confer legal ownership of any portion of the property to Douglas. Further steps and agreement would be necessary to achieve that.
- [31] As to Ken's evidence that Mildred confirmed at the meeting that the Cabin Section "was to be ours", I find this did not create a binding obligation to convey or recognize Douglas' ownership in the property. As I discuss in a moment, I find this statement, if it was made, was given in the context of the subdivision proposal the previous year. That is, the Cabin Section "was to be" Douglas' and his family's property, if it could be subdivided. However, even if this statement was intended to more broadly recognize Douglas' ownership, it is in the nature of a very general statement made in the context of family discussions about the property. It was not intended to create binding legal obligations. In this respect I agree with counsel for the defendants that the following passage from *Suen* captures the nature of this statement:

- [43] Communications in the family context are often no more than statements of intent or wishes. For a promise, in that context, to rise to the level of a binding enforceable contract there must be strict proof of the terms of the bargain including: the parties, the property, and the consideration.
- [32] Other elements needed for a binding contract were also absent or, at best, uncertain. Key among them is the uncertainty over how Douglas' ownership interest would be given legal effect without a subdivision. In my view, there could not be a binding agreement as to ownership of the Cabin Section when the parties did not know how that ownership could be given legal effect. The plaintiffs argue the interest could be recognized through trust principles but there was no discussion of a trust at the meeting at the well or anytime before or after. To create a trust, there must be a specific intention to do so, with a clear declaration of trust. Courts are unwilling to allow imperfect gifts to take effect as a declaration of trust: *Xu v. Hu*, 2021 BCCA 2 at para. 16. There is no evidence here of an intention to create a trust.
- [33] The plaintiffs further argue the existence of a binding agreement is demonstrated by Douglas's actions in the following year. Ken testified that around 1986, after the meeting at the well, Douglas arranged and paid for power to be extended to the property. He said some 12 poles and a transformer were necessary to bring the power to the property from Highway 99 and Douglas told him he paid \$20,000 for this. He testified that Douglas would not have paid this large amount of money to improve the property unless he was confident that Mildred had recognized his ownership in the Cabin Section.
- [34] There is no dispute that Douglas paid some amount of money to bring power to at least the cabin. Marlene maintains that Douglas paid no more than \$3,000 for the pole needed for the Cabin while Mildred likely paid the same for another pole needed to bring power to the house. Marlene knew nothing about another eight or ten poles needed to bring the power to the property line from Highway 99.
- [35] Regardless of whether the amount was \$20,000 or \$3,000, I am not persuaded this proves there was a binding agreement reached at the meeting at the well. At most, it shows that Douglas was prepared to expend that amount of money to bring power to the cabin to make it more enjoyable to use. This might suggest a belief on his part that he had received or would receive recognition that he owned the Cabin Section, but that subjective belief does not prove a meeting of the minds with Mildred and Delphine. That point is aptly made in *Hoban Construction Ltd. v. Alexander*, 2012 BCCA 75 at para. 35, where the Court of Appeal endorsed the following passage from G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed (Toronto: Thomson Canada Limited, 2006) at 15:

Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. The law is concerned not with the parties' intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did ; it is whether a

reasonable [person] in the situation of that party would have believed and understood that the other party was consenting to the identical terms.

[Footnotes omitted, Emphasis added]

- [36] There is nothing in Ken's description of the meeting at the well or in the participants' conduct afterwards to suggest Mildred and Douglas consented to identical terms to recognize a right of ownership for Douglas and his heirs in the Cabin Section or the property more broadly. As I discuss under proprietary estoppel, Mildred and Delphine's conduct in the years after 1985 evince nothing more than a willingness to give effect to the spirit of the proposal made in Mr. Bilinsky's December 4, 1984 letter that Douglas rejected. There is nothing in their conduct that demonstrates a manifest intention to be legally bound to an obligation to confer on Douglas or his heirs an interest in the property.
- [37] Further, Douglas' own actions suggest he remained uncertain about the legal status of his claim to the Cabin Section after 1985. In a letter dated September 21, 1994, addressed as "To whom it may concern", Douglas purported to authorize Ken "to be my agent to negotiate any and all claims that I have on the property left in my father's estate located at McGuire, B.C." [my emphasis]. His use of the word "claims" suggests the matter was still unresolved in his mind as of 1994.
- [38] Ken testified this letter relates to efforts to obtain building permits and a railway crossing for the property and not to any unfinished business between Douglas and Mildred. He said the parties were still trying to find a way to have Douglas shown as an owner of the Cabin Parcel so that Douglas would have standing to apply to third parties for such permits. However, as between Mildred and Douglas, the ownership question was settled with Douglas.
- [39] I find this evidence unpersuasive. The letter plainly refers to "claims" Douglas has to the property, not to the implementation of an agreement with Mildred.
- [40] Factually, I find the meeting at the well was not convened to reach an agreement on ownership of the property but to discuss the location of the property line for the subdivision proposal. As I will now explain, I find on a balance of probabilities that the meeting took place in the summer of 1984, not 1985 as Ken recalled, and it was done to advance the subdivision proposal that Mr. Bilinsky presented to Whistler in his September 27, 1984 letter.
- [41] Ken was clear in his evidence that the focus of discussion in the meeting was where to draw the boundary line between the Cabin Section and that part of the property that Mildred and Delphine would retain. The critical point of that discussion, at least from Douglas' perspective, was to ensure that the Cabin Section would have access to the well. Ken was also clear in recalling that after the meeting Craig Duncan prepared a survey of the proposed new lot.

[42] Significantly, Mr. Bilinsky's September 27, 1984 letter to the Municipality of Whistler asking for the subdivision references a survey plan that identifies the proposed new lot:

Mrs. [Mildred] Kelly and Mrs. [Delphine] McKenzie wish to give a portion of the lot to Mrs. Kelly's brother, this being the area shown in red on the enclosed copy of a survey plan. As such, I would appreciate receiving your comments and concerns regarding a possible subdivision of this lot to accomplish this purpose.

[Emphasis added]

[43] The survey plan is not included with the copy of the letter in evidence but I infer it must be the plan that Ken recalls Craig Duncan preparing. Ken was clear that the plan was prepared after the meeting where the boundary was agreed to. That means the meeting had to have taken place before Mr. Bilinsky's September 27, 1984 letter to Whistler, probably in the summer of 1984.

[44] That sequence makes considerably more sense that Ken's suggestion that the meeting was after the subdivision failed. Logic would suggest that Mildred and Douglas would agree on a proposed lot boundary before approaching Whistler with a subdivision inquiry. Why would they only come to a boundary agreement after the subdivision failed?

[45] This sequence also accords with Delphine's evidence, which I find to be more logical on this point. Although she has no knowledge or at least no recollection of the meeting at the well, she was clear that she and Mildred were willing to gift the Cabin Section to Douglas provided it could be subdivided from the rest of the property. She recalls attending a meeting with Mildred in which Mr. Bilinsky firmly advised against putting Douglas on title to the whole of the property because it would impede their ability to sell the property if they ever wished to do so. The subdivision was therefore critical because it would allow them to transfer title of the Cabin Section to Douglas while retaining the balance of the property for themselves with the freedom to sell it, if and when they wished. When the subdivision proposal failed, Mildred and Delphine instructed Mr. Bilinsky to make the offer in his December 4, 1984 letter which Douglas rejected. It makes no sense to have a meeting to agree on a proposed boundary after the subdivision failed but it is perfectly logical that such a meeting would have occurred before.

[46] Thus, in addition to finding the legal requirements for an agreement are not established on the evidence, I find the meeting at which it is said that the agreement was reached occurred before the subdivision proposal was made to Whistler and the purpose of that meeting was to identify a boundary to put forward in that subdivision plan. There was no agreement made at that time or any other time to recognize or confer an ownership interest in the Property for Douglas. The only agreement reached was on the location of a boundary that would create the Cabin Section as a new parcel of land to be registered in Douglas' name if the subdivision was accepted. Since the subdivision failed, so too did the proposed gift of an interest to Douglas. Douglas then rejected the alternative proposal outlined in Mr. Bilinsky's December 4, 1984 letter and, thereafter, Mildred and Delphine had no legal obligation owing

to Douglas in respect of the property.

[47] For those reasons, I would dismiss the plaintiffs' claim in contract.

B. Proprietary Estoppel

[48] The plaintiffs next claim the doctrine of proprietary estoppel gives them an interest in the property. They argue that even if Mildred and Delphine did not make an enforceable agreement to recognize Douglas' ownership of the Cabin Section, they nevertheless committed to do so and this led Douglas and the plaintiffs to invest time and money into maintaining the property in reliance on that promise. They claim this gives them a proprietary right to the property in proportion to the promised section.

[49] The doctrine of proprietary estoppel can, in some circumstances, make enforceable a promise that lacks contractual force. As stated in *Cowper-Smith v. Morgan*, 2017 SCC 61 at para. 1: "Equity enforces promises that the law does not." It does so when it would be unfair and unjust in the circumstances to permit a person to resile from their promise: *Cowper-Smith* para. 15. The elements needed to establish a claim in proprietary estoppel are:

- a) a representation or assurance to the claimant, on the basis of which the claimant expects to enjoy some right or benefit over property;
- b) the claimant relies on that expectation by doing or refraining from doing something, and this reliance is reasonable in all the circumstances; and
- c) the claimant suffers a detriment as a result of their reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on their word.

Cowper-Smith, para. 15.

[50] I am not persuaded that any element of proprietary estoppel is made out in this case.

[51] As to the first element, I find that neither Mildred nor Delphine made an unconditional statement that the Cabin Section would be conveyed to Douglas or that they would recognize his and his family's ownership in it. Initially, the only representation was that they would transfer that portion of the property to Douglas if it could be subdivided. In other words, it was a promise of a gift, conditional upon the subdivision. When the subdivision failed, so too did any conditional gift.

[52] After the subdivision failed, Mildred and Delphine instructed Mr. Bilinsky to make the alternative proposal in his December 4, 1984 letter but Douglas rejected that proposal. To the extent this proposal could be characterized as a "promise", it lost any legal or equitable force once Douglas rejected it. Fairness does not require that a person be held to a rebuffed promise. Moreover, it would have been unreasonable for Douglas to act in reliance on an offer he had turned down.

- [53] For that reason, I also find that Douglas did not reasonably rely on a promise when he spent money to bring power to the property. He knew by then that Whistler had rejected the subdivision and he had rejected Mildred and Delphine's alternative proposal. The reason he decided to invest in the power in those circumstances is a mystery that died with him. Insofar as he did so in reliance on a promise from Mildred, it was unreasonable to do so given the failed subdivision and his subsequent rejection of the December 4, 1984 alternative proposal. There was no extant promise by that point.
- [54] Despite Douglas' rejection of the December 4, 1984 proposal, Delphine revived the idea in 2002 when she called Ken to tell him she was considering selling the property. She told Ken she would be willing to sell it to the McKenzie Siblings for 75% of assessed value in recognition of the "promise" Mildred had made to Douglas (it seems Delphine described that as a "promise" but, as I have suggested earlier, I would characterize it as a proposal). If the siblings could not buy the property, Delphine was willing to give them a share of the proceeds of sale, likely 25%. The plaintiffs claim this is a promise enforceable by way of proprietary estoppel.
- [55] There was some discussion in this phone call about whether Michelle would be part of the sibling group if they bought the property. Michelle had a falling out with Douglas around 1989 and they did not see or speak with each other after that. Michelle also became estranged from the other siblings around that time but eventually reconnected with Marlene. She has had no relationship with Ken or Jacqueline since the 1989 falling out. As far as Ken was concerned, it was "not [Delphine's] issue" whether Michelle be included in a deal to buy the property or not. However, Delphine saw matters differently. She testified that she was only willing to sell the property to all four McKenzie Siblings or share a portion of the proceeds of sale with all of them. Michelle would have to be part of any deal. It seems Ken did not appreciate that during the phone call.
- [56] It was Delphine's impression from the call that Ken wanted to buy the property for himself. She testified that she asked him about his sisters' involvement and Ken said only that he would give them a piece of paper to confirm they could use it. Delphine said she did not like that and, although she did not tell him so in the call, she testified that she would not have sold the property just to Ken. In light of her concerns, she phoned Jacqueline and Marlene after this call to tell them about her intentions to sell.
- [57] It seems there was some misunderstanding over whether Ken intended to buy the land for himself or together with Jacqueline and Marlene. Ken was adamant that it was never his intention to buy it himself and he would not have been able to do so even if he wanted to. It may be that Delphine misunderstood him during their call. Regardless, it became clear during Ken's cross-examination that he intended to exclude Michelle from any deal to buy the property from Delphine, and it was clear from Delphine's evidence that she would not have sold the property to any of the McKenzie Siblings unless all four were included.

- [58] In a letter to Ken dated February 5, 2002, Marlene described her phone call with Delphine. That letter made clear that Marlene at least understood Delphine's position to be that all four McKenzie Siblings must be part of any deal. Thus, even if Ken did not appreciate that after his call from Delphine, he was on notice that it was an issue very shortly thereafter.
- [59] I find that Ken and Jacqueline knew that an agreement involving all four McKenzie Siblings could never materialize given the toxic relationship between the two camps and particularly with Michelle. At the same time, Ken was informed by Marlene that Delphine would only sell them the property if Michelle was part of the deal. Ken's unwillingness to include Michelle would therefore make any deal impossible but there is no evidence Ken was willing to back away from his position. It was, or ought to have been, clear to Ken and Jacqueline that a deal was going to be elusive and, in those circumstances, it could not be reasonable for them to rely on an expectation that Delphine would sell the property to them.
- [60] Thus, I find nothing in the 2002 phone call that gives rise to a proprietary estoppel. Delphine did nothing more than share her thoughts with Ken about a potential sale of the property in a way that could benefit the McKenzie Siblings. She viewed this as a way to give effect to the efforts Mildred had made some 15 years earlier confer some benefit in relation to the property to Douglas. She made no promise and said nothing that should have given Ken or Jacqueline reason to act to their detriment in reliance on what Delphine had said. Moreover, uncertainties abounded as to whether any kind of arrangement could be achieved, particularly in view of the clear disagreement over Michelle's potential involvement. Reliance in those circumstances could not be reasonable.
- [61] Another 20 years passed before Delphine ultimately sold the property. I find the reason she delayed in selling after the 2002 phone calls is immaterial to the plaintiffs' claim. On balance, I find she simply was not yet ready to sell. Had the McKenzie Siblings been united in an agreement for the four of them to buy the property, Delphine may well have sold it to them in 2002 or shortly thereafter. However, by 2023 the subdivision efforts had failed, Douglas had rejected the December 4, 1984 alternative proposal, and there was an apparent unwillingness on Ken's part to take up Delphine's idea of selling the property to all four siblings. Thus, despite Delphine's reference to honouring Mildred's "promise" during the 2002 phone calls, it would be unreasonable to think her 2002 proposal would still be on the table 20 years later. I find no proprietary estoppel arises in respect of the 2023 sale.
- [62] The plaintiffs also point to a brief discussion Ken had with Delphine at Lions Gate Hospital in 1998 where Mildred was living out the last of her days. Ken testified in his direct examination that he ran into Delphine in parking lot after he and his wife had visited Mildred. Ken said he told Delphine they needed to get together at some point to discuss the property. He said Delphine agreed and said they would do so after Mildred dies, which was thought to be imminent. Ken said he was okay with that. This is no more than a promise to discuss the issue after Mildred died, which Delphine did with her 2002 phone call.

- [63] In cross examination, Ken expanded on this conversation and said Delphine also told him he should not worry and that she would see to it that the McKenzie Siblings received the Cabin Section. I am doubtful that Delphine made that statement given that Ken only brought it up when being pressed in cross-examination. Regardless, I do not view a statement of that nature to be a promise but rather something in the nature of an expression of intent in a family context, as discussed in Suen at para. 43. Moreover, the circumstances in which the statement is said to have been made - in a hospital parking lot while Delphine's mother was inside close to passing - are not conducive to reasonable reliance on Ken's part.
- [64] Nor can I find that Ken, Jacqueline, or any of the McKenzie Siblings acted to their detriment on this or any statement or representation made by Mildred or Delphine. As I discuss in more detail under unjust enrichment, the plaintiffs did not expend significant amounts of money on the property and what they did spend was to enhance their own enjoyment of it. These were not long-term investments aimed at improving or maintaining the capital value of the property.
- [65] Undoubtedly, the possibility of conferring an interest in the property, or some benefit in relation to it, to the McKenzie family percolated over the decades after James McKenzie died and left the property to Mildred and Delphine with Douglas' endorsement. However, none of the statements that underlie that possibility, whether taken individually or cumulatively, give rise to a promise for which equity would demand performance. I would dismiss the claim in proprietary estoppel.

C. Unjust Enrichment

- [66] The plaintiffs' third ground is that the defendants have been unjustly enriched by the McKenzie family's contributions of money and labour to the property over the years. The plaintiffs argue the appropriate remedy for that unjust enrichment would have been a constructive trust amounting to a 25% interest in the property had it not been sold. Now that it has been sold, they seek an order that the remaining proceeds held in trust be paid out to them.
- [67] The doctrine of unjust enrichment applies when a defendant receives a benefit from the plaintiff in circumstances which it would be "against all conscience" for the defendant to keep that benefit: *Moore v. Sweet*, 2018 SCC 52 at para. 35. At the heart of the doctrine "lies the notion of restoring a benefit which justice does not permit one to retain": *Kerr v. Baranow*, 2011 SCC 10 at para. 31. To succeed in unjust enrichment, the plaintiffs must show they gave something that was received and retained by the defendants without a juristic reason. There are three elements to the cause of action:
- a) an enrichment of or benefit to the defendant;
 - b) a corresponding deprivation of the plaintiff; and
 - c) the absence of a juristic reason for the enrichment.

Kerr, para. 32

- [68] The benefit conferred on the defendant must be tangible but can be a "negative" benefit in the sense that it spared the defendant of an expense they would have incurred: Kerr para. 38. Further, the enrichment of the defendant must correspond with a deprivation the plaintiff has suffered: Kerr, para. 39.
- [69] The absence of a juristic reason simply means there is "no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff": Kerr, para. 40. A "donative intent" (i.e. an intention to make a gift) can be a juristic reason: Kerr, para. 41. In assessing whether there is a juristic reason for an enrichment, courts will look at the reasonable expectations of the parties and the moral and policy-based arguments about whether the retention of a particular benefit would be unjust: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at paras. 45-46; *Gill v. Gill*, 2022 BCCA 264 at para. 74.
- [70] In my view, the plaintiffs' unjust enrichment claim can be disposed of on the juristic reason analysis.
- [71] The plaintiffs argue they have spent time and money to maintain and improve the property over decades, and this has enriched the defendants as legal owners of the property. The most significant expense they point to is their claim that Douglas spent \$20,000 to bring power to the property. I find the evidence as to the amount of that expenditure falls short of the clear, convincing, and cogent evidence needed to prove a fact in any civil case: *F.H. v. McDougall*, 2008 SCC 53 at para. 46. It is supported only by Ken's hearsay evidence that Douglas told him, some 40 years ago, that he paid \$20,000 for the power. There is no evidence of the context in which this statement was made that would suggest the statement is inherently trustworthy such that it would have been admissible over an objection, had the defendants made one: *R. v. Bradshaw*, 2017 SCC 35 at para. 27. I am unable to find the statement sufficiently trustworthy to prove a fact in issue.
- [72] Regardless, it was Douglas who is said to have paid the \$20,000, not the plaintiffs. I know of no authority that permits the plaintiff to rely on their long-deceased father's expenditure, 40 years ago, to support their present claim that the defendants have been unjustly enriched at their expense.
- [73] Thus, excluding the \$20,000, the total expenditures on the property by Ken and Jacqueline amount to no more than a few thousand dollars over their lifetime. Each of the McKenzie Siblings spent some amount of money to improve the cabin and maintain the property. They furnished the cabin largely with items no longer needed in their own homes. They replaced the wood-burning stove from time to time and replaced the fridge. They spent some money on plumbing to pipe well water to the house. Ken spent a few hundred dollars on chainsaws and other tools over the years to clear dead trees and cut the grass. In 2021, Ken arranged for a young couple to live in the cabin rent free in exchange for their labour to fix up the cabin. Ken said he paid some \$3,400 for materials but produced no receipts.

- [74] All told, each sibling spent, at most, a few thousand dollars over their decades of use to maintain and improve the cabin and the surrounding property. The time they put into maintenance was done largely while they were enjoying the property during the summer months.
- [75] There was no agreement respecting the McKenzie Siblings' use of the property or the sharing of expenses. Mildred and Delphine gave the family unrestricted use of the cabin and the property without a fee. They came and went as they wished and Mildred and Delphine welcomed their use. They paid for their own power at the cabin - about \$100 per year - but made no contribution to the property taxes. Those were paid by Mildred and Delphine.
- [76] In short, the McKenzie Siblings had a lifetime of enjoying the property at no expense save for the few thousand dollars they spent over decades to improve the cabin and help maintain the grounds. All four of them took considerable pleasure in the property. They valued the time they spent there and the memories it gave them. The cabin was rustic - a "wooden tent" as Marlene described it - but, as Marlene said, "the beauty of the place is in our hearts." She said she spent maybe \$2,000 on the property plus the power bills over her lifetime and asked rhetorically, "where else could you get that pleasure for \$4,000?" Even including the recent expenses not accounted for with receipts, I find that Ken's outlay of money is not substantially more than what Marlene put into the property. Jacqueline's was even less.
- [77] The plaintiffs' lifetime of using the property necessitated certain repairs, maintenance, and upkeep. I struggle to find the defendants were enriched by these expenditures of time and money which were incurred largely to enhance the McKenzie Siblings' own enjoyment of the property. To the extent there has been any enrichment, it is far outweighed by the lifetime of otherwise free use of the property by the plaintiffs and the immense pleasure they have received from it. To the contrary, I would characterize the plaintiffs' modest outlay of time and expenditures to be quite a bargain for what they received in return. Marlene and Michelle testified that neither of them had any expectation of a quid pro quo for their expenditures on the property and I find there is similarly no reasonable basis for Ken and Jacqueline to have had any such expectation. Their unrestricted and otherwise free use of the property over their lifetime is clearly a juristic reason for their relatively minor expenditures on it.
- [78] For those reasons, I find there has been no unjust enrichment.

IV. Conclusion

- [79] I would dismiss the plaintiffs' claim with costs to the defendants at scale B.

"Kirchner J."

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